No. 97-2050

FILED
JUN 20 1998
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

RONALD GRABOSKI, RICHARD BELLANZA, EDWARD HANDIBODE, RICHARD GLEASON, GEORGE GIOVINAZZO, STEPHEN GIBBONS, and all those plaintiffs' whose names are set forth in schedule "A," which is annexed hereto, incorporated herein and made a part hereof,

Petitioners,

- against -

RUDOLPH GIULIANI, Mayor of the City of New York

(caption continued on inside front cover)

BRIEF IN OPPOSITION

MICHAEL D. HESS,
Corporation Counsel for the
City of New York,
Attorney for Municipal Respondents,
100 Church Street,
New York, N.Y. 10007.
(212) 788-1027 or 788-1065

LEONARD J. KOERNER,
PAMELA SEIDER DOLGOW,
JAMES J. DWYER,
JOHN HOGROGIAN,*
of Counsel.

* Attorney of Record

June 17, 1998.

and as a member of the Board of Trustees of the Firemen's Variable Supplements Fund and Fire Officers Variable Supplements Fund, ALAN HEVESI, as Comptroller of the City of New York and as a Member of the Board of Trustees of the Firemen's Variable Supplements Fund and Fire Officers Variable Supplements Fund, THE CITY OF NEW YORK, THE BOARD OF TRUSTEES OF THE FIREMEN'S VARIABLE SUPPLEMENTS FUND, THE BOARD OF TRUSTEES OF THE FIRE OFFICERS' VARIABLE SUPPLEMENTS FUND, "JOHN DOE" and "JOHN ROE," individually and as members of Board of Trustees of the Uniformed Firefighter's Association and members of the Firemen's Variable Supplements Fund, and as members of the Board of Trustees of the Uniformed Fire Officer's Association, and members of the Fire Officer's Variable Supplements Fund, THE BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE DEPARTMENT PENSION FUND, NEW YORK CITY FIRE DEPARTMENT PENSION FUND, THE FIREMEN'S VARIABLE SUPPLEMENTS FUND, THE FIRE OFFICERS VARIABLE SUPPLEMENTS FUND, THE NEW YORK CITY FIRE DEPARTMENT, HOWARD SAFIR, as Commissioner of the New York City Fire Department, GEORGE PATAKI, Governor of the State of New York and the STATE OF NEW YORK,

Respondents.

COUNTER-QUESTION PRESENTED

Should this Court deny the petition for a writ of certiorari, in that the decision of the Court of Appeals does not present any issue of federal law which merits review by this Court?

TABLE OF CONTENTS

Page

COUNTER-QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

ARGUMENT

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI. 10

A. The Court of Appeals correctly dismissed petitioners' claim based on the Contract Clause 10

B. The Court of Appeals correctly applied established rules of law in holding that petitioners failed to state a claim of discrimination on the basis of disability. 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases:	Page
Board of Education v. Buffalo Teachers Federation, 89 N.Y.2d 370 (1996)	12-13
Felde v. City of San Jose, 839 F.Supp. 708 (N.D. Cal. 1994) aff'd, 66 F.3d 335 (9th Cir. 1995)	16-17
Gagliardo v. Dinkins, 89 N.Y.2d 62 (1996)	15, 18

No. 97-2050

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

RONALD GRABOSKI, RICHARD BELLANZA, EDWARD HANDIBODE, RICHARD GLEASON, GEORGE GIOVINAZZO, STEPHEN GIBBONS, and all those plaintiffs' whose names are set forth in schedule "A," which is annexed hereto, incorporated herein and made a part hereof,

Petitioners,

- against -

RUDOLPH GIULIANI, Mayor of the City of New York and as a member of the Board of Trustees of the Firemen's Variable Supplements Fund and Fire Officers Variable Supplements Fund, ALAN HEVESI, as Comptroller of the City of New York and as a Member of the Board of Trustees of the Firemen's Variable Supplements Fund and Fire Officers Variable Supplements Fund, THE CITY OF NEW YORK, THE BOARD OF TRUSTEES OF THE FIREMEN'S VARIABLE SUPPLEMENTS FUND, THE BOARD OF TRUSTEES OF THE FIRE OFFICERS' VARIABLE SUPPLEMENTS FUND, "JOHN DOE" and "JOHN ROE," individually and as members of Board of Trustees of the Uniformed Firefighter's Association and members of the Firemen's Variable Supplements Fund, and as members of the Board of Trustees of the Uniformed Fire Officer's Association, and members of the Fire Officer's Variable Supplements Fund, THE BOARD OF

TRUSTEES OF THE NEW YORK CITY FIRE DEPARTMENT PENSION FUND, NEW YORK CITY FIRE DEPARTMENT PENSION FUND, THE FIREMEN'S VARIABLE SUPPLEMENTS FUND, THE FIRE OFFICERS VARIABLE SUPPLEMENTS FUND, THE NEW YORK CITY FIRE DEPARTMENT, HOWARD SAFIR, as Commissioner of the New York City Fire Department, GEORGE PATAKI, Governor of the State of New York and the STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

I

In this civil action, the petitioners are approximately three thousand retired New York City firefighters. They challenge a New York statutory program which provides certain monetary benefits (entitled variable supplements fund benefits) to firefighters who retire for service after at least twenty years, but not to disability retirees. Petitioners

challenge the statutory program as an unconstitutional impairment of their allegedly contractual rights under collective bargaining agreements. They also challenge the statutory program as discriminatory under the Americans with Disabilities Act.

The United States Court of Appeals for the Second Circuit unanimously rejected both challenges in an opinion which appears in petitioners' appendix at pages 3a through 36a. Petitioners seek review of that decision on the merits.

II

All of the petitioners are retired New York City firefighters who receive retirement benefits from the Fire Department Pension Fund. That fund is governed by Subchapter 2 of Chapter 3 of Title 13 of the New York City Administrative Code.

At issue in this case are two basic types of retirement under the Fire Department Pension Fund: retirement for service and retirement for disability. Retirement for disability can be for ordinary disability or for accident disability. In order to retire for service, a firefighter must have rendered a minimum of twenty years of service. Administrative Code §§ 13-349 - 13-350. The retiree then receives an annual retirement allowance equal to one-half of his or her final salary, plus one-sixtieth of his or her average annual earnings after his twentieth anniversary, adjusted by several other factors not pertinent here. Administrative Code § 13-358 - 13-359. The retirement allowance is subject to federal income taxation. Some of the petitioners have retired for service, but none of them after October 1, 1968.

In order to retire for accident disability, an officer must be physically or mentally incapacitated from

performing his or her duties as a result of an accidental injury suffered in the line of duty. Administrative Code § 13-353. Accident disability benefits are particularly coveted. A firefighter retiring for accident disability receives a pension of three-quarters of his or her final salary, irrespective of length of service. Administrative Code § 13-364 - 13-366. This retiree also receives an annuity funded by his or her member contributions and an Increased Take Home Pay pension funded by the City. Id. Those accident disability retirees who have worked beyond twenty years also receive an additional pension equal to one-sixtieth of total earnings received after the twentieth anniversary. New York General Municipal Law § 207-b. Moreover, this retirement allowance is fully excludable from federal income taxation and qualifies for a tax exemption under Section 104(a)(1) of the Internal Revenue

Code. Some of the petitioners retired for accident disability.

In order to retire for ordinary disability, a firefighter must be physically or mentally incapacitated from performing his or her duties as a result of something other than an accidental injury suffered in the line of duty. Administrative Code § 13-352. A firefighter who retires for ordinary disability receives a retirement allowance of one-third of his or her final salary if he or she served less than ten years. Administrative Code § 13-362 - 13-363. The firefighter receives a retirement allowance of one-half of his or her final salary if he or she served at least ten but less than twenty years. Id. An ordinary disability retiree with greater than twenty years of service receives an additional allowance equal to one-fortieth of the final salary times years of service beyond the twentieth anniversary. Id. Using the higher fractional rate and the final year's

salary as the pensionable compensation base, rather than the average of all years beyond twenty, provides a significant advantage for the ordinary disability retiree. By contrast, the base for the corresponding additional allowance for service retirees and accident disability retirees is the average salary received after the twentieth anniversary. Moreover, a portion of the first $5,000 of income is eligible for a federal tax credit as long as a member qualifies for Social Security disability payments. Internal Revenue Code § 105(d). The petitioners who did not retire for service or for accident disability did retire for ordinary disability.

This review of the statutory provisions demonstrates that disability retirees (both ordinary and accident) enjoy certain pension benefits which service retirees do not.

III

Only firefighters who retire for service after October 1, 1968, receive variable supplements fund ("VSF")

benefits. Subchapter 5 of Chapter 3 of Title 13 of the Administrative Code governs the Firefighters' Variable Supplements Fund. Administrative Code §§ 13-382 - 13-391.1. Subchapter 6 governs the Fire Officers' Variable Supplements Fund. Administrative Code §§ 13-392 - 13-401. The Firefighters' VSF pays a specific monetary sum to service retirees below the rank of lieutenant, while the Fire Officers' VSF pays a similar sum to service retirees who held the rank of lieutenant or higher. Petitioners challenge the statutory exclusion of disability retirees from these VSF benefits.

Administrative Code § 13-385 establishes a defined annual VSF benefit payment to each eligible firefighter retiree on a fixed schedule. Administrative Code § 13-395 does the same for eligible fire officer retirees. By statute, only service retirees are eligible to receive these VSF benefits. Administrative Code §§ 13-382(5), 13-392(6). As

a rule, disability retirees are ineligible to receive VSF benefits.

IV

The Court of Appeals affirmed the District Court's dismissal of petitioners' claims for failure to state a claim upon which relief could be granted. That Court found that petitioners had no contractual rights to receive VSF benefits (33a-34a). That Court also held that disability retirees who did not work twenty or more years simply do not meet the VSF eligibility requirements, just as non-disabled firefighters who do not work twenty or more years are not eligible (26a-28a). That Court further held that disability retirees who did work twenty or more years had their option of either service or disability retirements and could not claim discrimination because they could not pick individual desirable elements from the two benefit-package options (28a-29a).

ARGUMENT

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI.

Petitioners present two grounds for review by this Court. Neither ground presents a federal question worthy of review by this Court. None of the factors set forth in Rule 10 are present in this case.

A. The Court of Appeals correctly dismissed petitioners' claim based on the Contract Clause.

Petitioners make a Contract Clause claim which both the District Court and the Court of Appeals rejected. Petitioners argue that the 1968 firefighters collective bargaining agreement and the 1970 fire officers collective bargaining agreement gave all firefighters and fire officers a contractual right to receive VSF benefits as a pension benefit. They further argue that the New York State Legislature impaired those contractual rights by creating

non-pension VSFs which paid benefits only to service retirees. That claim is, as the Court of Appeals held, meritless. The two collective bargaining agreements, read reasonably, did not create any contractual rights to VSF benefits.

The language of the agreements simply did not guarantee anyone a VSF benefit. Section 6 of Article VII of the 1968 UFA agreement stated that "[t]he purpose of this fund shall be to provide a supplemental benefit on a variable annuity basis for Article I and IB firemen, as determined by the trustees." The 1970 UFOA agreement contains parallel language. These provisions do not guarantee all retirees a VSF benefit. They leave the determination of beneficiaries to the VSF trustees. These clauses do not support plaintiffs' argument.

The Contract Clause argument fails for an even more fundamental reason. Under New York Retirement

and Social Security Law § 113(b), the creation of the Fire Department VSFs could only be accomplished by State legislation. The collective bargaining agreements could not create a binding obligation on the City or the pension funds to pay VSF benefits to anyone. As the language of the 1968 UFA agreement reflects, the parties agreed to present legislation for the Legislature to consider. Indeed, that agreement provided that if legislation were enacted, no contractual rights regarding VSF benefits would survive. The 1970 UFOA agreement recognized that legislation had already created the VSF for fire officers. Both collective bargaining agreements acknowledged that State legislation alone could create a VSF.

In Board of Education v. Buffalo Teachers Federation, 89 N.Y.2d 370, 375 (1996), the New York Court of Appeals stated that "[c]ertain provisions of public sector collective bargaining agreements require legislative

action for their implementation and are effective only when the appropriate legislative entity discretely votes to approve them." The instant case comes within that principle. The agreements between the City and the unions did not bind the State Legislature. New York statutory law explicitly provides that provisions of impasse panel recommendations and collective bargaining agreements related to City workers, requiring legislative action, are not binding unless and until legislation is passed. New York City Administrative Code § 12-311(c)(4)(e). The Legislature was not bound to act in accordance with the collective bargaining agreements. By plaintiffs' logic, legislative non-action would also have impaired their contractual rights, although it would be hard to bring that scenario within the wording of the Contract Clause.

In sum, the Court of Appeals correctly rejected plaintiffs' Contract Clause claim. Certiorari should not be granted.

B. The Court of Appeals correctly applied established rules of law in holding that petitioners failed to state a claim of discrimination on the basis of disability.

The Court of Appeals employed a dichotomy in analyzing petitioners' ADA claim. One category of petitioner consisted of those who retired for disability after serving less than twenty years of service (26a-28a). The other category consisted of those who retired for disability after serving twenty or more years of service (28a). All of the petitioners fall into one of these two categories.

As to the petitioners who worked less than twenty years, the Court of Appeals held that the complaint failed to state a claim upon which relief could be granted (A35-A37). The Court stated its central holding as follows (A35-A36):

> The [petitioners who worked less than twenty years] are similarly situated not with twenty-year "for service" retirees, but with non-disabled retirees who retire after an equivalent period of service. Because the latter group is not entitled to VSF benefits, there is no unlawful discrimination.

The Court cited an EEOC commentary which stated that "[w]here an employer offers ... a service retirement plan, there is no ADA violation as long as the service retirement plan treats persons who are covered by the ADA the same as other employees" (27a).

The Court also relied upon Gagliardo v. Dinkins, 89 N.Y.2d 62 (1996), in which the New York Court of Appeals rejected an identical ADA claim raised by retired New York City Housing and Transit police officers (27a). The Court of Appeals correctly concluded that "[t]he ADA requires only that persons with disabilities have the opportunity to receive the same benefits as non-disabled

officers who have given an equivalent amount of service" (A37).

As to the petitioners who worked twenty or more years, the Court of Appeals again held that the complaint failed to state a claim upon which relief could be granted (A37-A38). The Court stated its central holding as follows (A38):

> Although the ADA is violated where "persons covered by the ADA who qualify for both a service retirement and disability retirement plan are required to take a disability benefit which is less advantageous," [citation omitted], nothing in the ADA requires an employer to provide to disabled employees the VSF benefits of a service plan in addition to freely-chosen disability benefits under a disability plan.

The Court relied upon Felde v. City of San Jose, 839 F. Supp. 708 (N.D. Cal. 1994), which later was affirmed without a reported decision, 66 F.3d 335 (9th Cir. 1995). All the petitioners who worked twenty or more years chose the benefits of a disability retirement. The Court of

Appeals correctly held that no discrimination on the basis of disability is shown by the personal selection of one retirement plan over another.

Petitioners argue that the Court of Appeals should have employed a multiplicity of sub-classes in analyzing their ADA claim. These sub-classes are based upon a small group of disability retirees who receive VSF benefits under an act of one-time legislative grace which allowed those retirees to keep that benefit which they had originally received because of administrative oversight. The proposed sub-classes do not add anything to the analysis of the benefits received by the vast majority of retirees and do not make a grant of certiorari appropriate. The Court of Appeals correctly held that the "for service" requirement does not work any discrimination on the basis of disability.

Petitioners also argue that they have a property right in VSF benefits because they represent deferred

compensation for services already rendered. Petitioners put an unwarranted gloss on an isolated statement in Gagliardo v. Dinkins, supra, 89 N.Y.2d at 75-76. Plaintiffs incorrectly assume that VSF benefits are like salary in that they accrue on a daily basis. VSF benefits do not accrue for each day of work. A firefighter becomes eligible for VSF benefits by working at least twenty years and retiring for service. One who works ten years is not eligible for half a VSF benefit. The fallacy in plaintiffs' premise is demonstrated by the fact that VSF benefits do not vary by the number of years served in excess of twenty years. VSF benefits are neither salary nor a pension; they are sui generis.

This Court should deny certiorari on petitioners' ADA claim. The Court of Appeals correctly decided this case by applying established principles of law.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

MICHAEL D. HESS,
Corporation Counsel of the
City of New York,
Attorney for Municipal Respondents.

By: John Hogrogian
JOHN HOGROGIAN
Assistant Corporation Counsel

LEONARD J. KOERNER,
PAMELA SEIDER DOLGOW,
JAMES J. DWYER,
JOHN HOGROGIAN,*
of Counsel.

* Attorney of Record